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7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 RUSSELL E. BURNS, et al.,

11 Plaintiffs,

12 v.

13 AUGUST CONSTRUCTION & SHORING, INC., a
California Corporation, AGUST AGUSTSSON, an
14 individual,

15 Defendants.

Case No.: C13-5132 MMC

**JUDGMENT PURSUANT TO
AMENDED STIPULATION**

16
17 IT IS HEREBY STIPULATED and AGREED (the “Stipulation”) by and between the
18 parties hereto, that Judgment shall be entered in the within action in favor of Plaintiffs RUSSELL
19 E. BURNS, et al. (“Plaintiffs” or “Trust Funds”) and against Defendants AUGUST
20 CONSTRUCTION & SHORING, INC., a California Corporation, AGUST AGUSTSSON, an
21 individual (collectively referred to hereinafter as “Defendants”), and/or alter egos and/or successor
22 entities, as follows:

23 1. Defendants entered into the Independent Northern California Construction
24 Agreement (“Independent Agreement”) with the Operating Engineers Local Union No. 3 of the
25 International Union of Operating Engineers, AFL-CIO (“Union”), which incorporates the Master
26 Agreement between the Union and the Associated General Contractors of California (“Master
27 Agreement”). The Independent Agreement and Master Agreement are collectively referred to
28 hereinafter as the “Bargaining Agreements.” The Bargaining Agreements are still in full force and

effect.

2. Agust Agustsson in his capacity as RMO/CEO/President of Defendant August Construction & Shoring, Inc. hereby confirms that he is authorized to enter into this Stipulation on behalf of all Defendants and further confirms that all successors in interest, assignees, and affiliated entities (including, but not limited to parent or other controlling companies), and any companies with which Defendants join or merge, if any, shall also be bound by the terms of this Stipulation as Guarantors. This shall include any additional entities in which Agust Agustsson is an officer, owner or possesses any ownership interest. Defendants and all such entities shall specifically consent to the Court's jurisdiction in writing at the time of any assignment, affiliation or purchase, as well as to all other terms herein.

3. Defendants have become indebted to the Trust Funds as follows:

4/13 Contributions (Paid-Late \$3,974.89)	\$0.00		
10% Interest (Paid \$217.98)	\$0.00		
20% Liquidated Damages Balance	\$375.13		
		\$375.13	
5/13 Contributions (Paid-Late \$1,097.86)	\$0.00		
10% Interest (Paid \$52.76)	\$0.00		
20% Liquidated Damages	\$189.76		
		\$189.76	
Subtotal Due:			\$564.89
Attorneys' Fees (through 3/27/14)			\$4,183.00
Costs (through 3/27/14)			\$922.69
TOTAL DUE:			\$5,670.58

4. Defendants shall *conditionally* pay the amount of **\$5,105.69**, representing all of the above amounts, less liquidated damages in the amount of **\$564.89**. *This conditional waiver is expressly conditioned upon Trustee approval following timely compliance with all of the terms of this Stipulation*, as follows:

(a) Beginning on **April 10, 2014**, and on or before the 10th day of each month thereafter for a period of five (5) months, through and including August 10, 2014, Defendants shall pay to Plaintiffs the amount of **\$1,047.00** per month;

(b) Payments may be made by joint check, to be endorsed by Defendants prior to submission. Defendants shall have the right to increase the monthly payments at any time and

1 there is no penalty for prepayment;

2 (c) The unpaid balance shall bear interest from April 10, 2014, at the rate of
3 10% per annum in accordance with the Bargaining Agreements and Plaintiffs' Trust Agreements;

4 (d) Checks shall be made payable to the *Operating Engineers Trust Funds*,
5 and delivered on or before each due date to Erica J. Russell, Esq. at Saltzman & Johnson Law
6 Corporation, 44 Montgomery Street, Suite 2110, San Francisco, California 94104, or to such other
7 address as may be specified by Plaintiffs;

8 (e) At the time that Defendants make their fourth (4th) stipulated payment,
9 Defendants may submit a written request for waiver of liquidated damages directed to the Board
10 of Trustees, but sent to Saltzman and Johnson Law Corporation with their fourth (4th) payment.
11 Defendants will be advised as to whether or not the waiver has been granted prior to the final
12 payment hereunder. Such waiver will not be considered until and unless all other amounts are
13 paid in full and Defendants' account is otherwise current;

14 (f) Prior to the last payment pursuant to this Stipulation, Plaintiffs shall advise
15 Defendants in writing, by email to agust@geosupport.com and jim@geosupport.com and by
16 regular mail, as to the final amount due, including interest and all additional attorneys' fees and
17 costs incurred by Plaintiffs in connection with the collection and allocation of the amounts owed
18 to Plaintiffs under this Stipulation. Defendants shall pay all additional attorneys' fees and costs
19 regardless of whether or not Defendants default herein. Any additional amounts due pursuant to
20 the provisions hereunder shall also be paid in full with the August 10, 2014 stipulated payment;
21 and

22 (g) Failure to comply with any of the above terms shall constitute a default of
23 the obligations under this Stipulation and the provisions of ¶ 10 shall apply.

24 5. In the event that any check is not timely submitted or fails to clear the bank, or is
25 unable to be negotiated for any reason for which Defendants are responsible, Defendants shall be
26 considered to be in default of the Judgment entered. If this occurs, Plaintiffs shall make a written
27 demand to Defendants by email to agust@geosupport.com and jim@geosupport.com and by
28 regular mail to cure said default *within seven (7) days of the date of the notice from Plaintiffs*. If

1 caused by a failed check, default will only be cured by the issuance of a replacement *cashier's*
 2 *check*, delivered to Saltzman and Johnson Law Corporation within the seven (7) day cure period.
 3 If Defendants elect to cure said default, and Plaintiffs elect to accept future payments, *all such*
 4 *future payments shall be made by cashier's check* at Plaintiffs' request. In the event default is not
 5 cured, all amounts remaining due hereunder shall be due and payable on demand by Plaintiffs.

6 6. Beginning with contributions due for hours worked by Defendants' employees
 7 during the month of **March 2014**, due on April 15, 2014 and delinquent if not received by the
 8 Trust Funds on April 25, 2014, and for every month thereafter until this Judgment is satisfied,
 9 **Defendants shall remain current in contributions** due to Plaintiffs under the current Collective
 10 Bargaining Agreement and under all subsequent Collective Bargaining Agreements, if any, and
 11 the Declarations of Trust as amended.

12 Defendants shall fax or email a copy of their contribution report for each month, together
 13 with a copy of that payment check, to *Erica J. Russell and Alicia Rutkowski at 415-882-9287* or to
 14 erussell@sjlawcorp.com and arutkowski@sjlawcorp.com, prior to sending the payment to the
 15 Trust Fund office.

16 Failure to comply with these terms shall constitute a default of the obligations under this
 17 Agreement and the provisions of ¶ 10 shall apply.

18 7. Defendants shall make full disclosure of all jobs on which they are working by
 19 providing Plaintiffs with an ongoing and updated list of jobs including, but not limited to, the
 20 name and address of the job, the start and completion dates, the identity of General
 21 Contractor/Owner/Developer, and by providing certified payroll if it is a public works job.
 22 **Defendants shall submit said updated list on or before the last day of the month either by**
 23 **email to both erussell@sjlawcorp.com and arutkowski@sjlawcorp.com, or by facsimile to**
 24 **Erica J. Russell and Alicia Rutkowski at 415-882-9287.** This requirement remains in full force
 25 and effect regardless of whether or not Defendants have ongoing work. In this event, Defendants
 26 shall submit a statement stating that there are no current jobs. A blank job report form is attached
 27 hereto for Defendants' use, as *Exhibit A*. **To the extent that Defendants are working on a**
 28 **Public Works job, or any other job for which Certified Payroll Reports are required, copies**

1 of said reports *will be faxed or emailed to Erica J. Russell and Alicia Rutkowski at 415-882-*
 2 *9287 or erussell@sjlawcorp.com and arutkowski@sjlawcorp.com concurrently with their*
 3 *submission to the general contractor, owner, or other reporting agency at Plaintiffs' request.*

4 Failure by Defendants to timely submit updated job lists shall constitute a default of the
 5 obligations under this agreement, which Defendants shall be permitted to cure within seven (7)
 6 days' written notice from Plaintiffs to Defendants.

7 8. **Audit:** Should the Trust Funds request an audit of Defendants' payroll records in
 8 order to confirm proper reporting and payment of contributions pursuant to the Bargaining
 9 Agreements, any failure by Defendants to comply with said request shall constitute a default of the
 10 obligations under this Agreement, which Defendants shall have ten (10) days to cure from receipt
 11 of written notice from Plaintiffs.

12 (a) In the event that amounts are found due on audit, Plaintiffs shall send a
 13 written demand to Defendants by email to agust@geosupport.com and jim@geosupport.com and
 14 by regular mail for payment in full of the amounts found due in the audit, including a full copy of
 15 the audit report and any findings, including contributions, liquidated damages, interest and audit
 16 fees owed.

17 (b) Defendants will be provided with ten (10) days in which to review the audit,
 18 and provide evidence to contest the findings. In the event that Defendants do not agree with the
 19 total found due, Plaintiffs shall provide any additional information or clarification requested by
 20 Defendants in writing within ten (10) days of the request therefor, or as soon as reasonably
 21 possible, and Defendants' time to respond to the audit report or comply with payment
 22 requirements shall then run from the time that Defendants receive Plaintiffs' response. Once the
 23 ten (10) day review period expires, in the event that the audit is not contested, payment in full
 24 shall be delivered to Erica J. Russell at the address provided above.

25 (c) If the audit is contested, and Defendants provide documentation in support
 26 of the dispute, Defendants shall be notified as to whether revisions will be made to the audit. If
 27 revisions are not made, payment will be immediately due.

28 (d) If revisions are made to said audit as a result of the dispute, payment in full

1 of the revised amount shall be due within ten (10) days of Defendants' receipt of the revised
2 billing.

3 (e) If Defendants are unable to make payment in full, Defendants may submit a
4 written request to revise this Judgment, modifying the payment plan (by monthly amount and/or
5 payment term), to add the amounts found due in the audit to this Judgment, subject to the terms
6 herein. If the Judgment is so revised, Defendants shall execute the Amended Judgment or
7 Amendment to Judgment within ten (10) days of Plaintiffs' preparation of said Amended
8 Judgment or Amendment to Judgment. Failure to execute the revised agreement shall constitute a
9 default of the terms herein.

10 (f) Failure by Defendants to submit either payment in full or a request to add
11 the amounts due to this Judgment within ten (10) days of the date due per the terms written above
12 shall constitute a default of the obligations under this agreement. All amounts found due on audit
13 shall immediately become part of this Judgment.

14 9. Failure to comply with any of the above terms shall constitute a default of the
15 obligations under this Stipulation and the provisions of ¶ 10 shall apply. Any unpaid or late-paid
16 contributions, together with 20% liquidated damages and 10% per annum interest accrued on the
17 contributions shall be added to and become a part of this Judgment and subject to the terms herein.
18 Plaintiffs reserve all rights available under the applicable Bargaining Agreements and Declarations
19 of Trust of the Trust Funds for collection of current and future contributions, and for any
20 additional past contributions not included herein as may be determined by Plaintiffs, pursuant to
21 employee timecards or paystubs, by further audit, or other means, and the provisions of this
22 agreement are in addition thereto. Defendants specifically waive the defense of the doctrine *res*
23 *judicata* as to any such additional amounts determined as due.

24 10. In the event that Defendants fail to make any payment required under ¶ 4 above, or
25 otherwise default on their obligations as detailed in this Stipulation, and such default is not timely
26 cured, the following will occur:

27 (a) The entire balance of **\$5,670.58**, as specified in ¶ 3 above, plus interest, but
28 reduced by principal payments received from Defendants, in addition to any unpaid contributions

1 then due plus 20% liquidated damages and 10% per annum interest on the unpaid or late-paid
2 contributions, shall be immediately due and payable, together with any attorneys' fees and costs
3 incurred during the term of this Stipulation;

4 (b) A Writ of Execution may be obtained against Defendants without further
5 notice to Defendants, in the amount of the unpaid balance plus any additional amounts due under
6 the terms herein. Such Writ of Execution may be obtained solely upon declaration by a duly
7 authorized representative of Plaintiffs setting forth any payment theretofore made by or on behalf
8 of Defendants and the balance due and owing as of the date of default;

9 (c) Defendants waive any notice of Entry of Judgment or of any Request for a
10 Writ of Execution upon default, and expressly waive all rights to stay of execution and appeal.
11 The declaration or affidavit of a duly authorized representative of Plaintiffs as to the balance due
12 and owing as of the date of default shall be sufficient to secure the issuance of a Writ of
13 Execution, without notice to Defendants; and

14 (d) Defendants shall pay all additional attorneys' fees and costs incurred by
15 Plaintiffs in connection with the collection and allocation of the amounts owed by Defendants to
16 Plaintiffs under this Stipulation, whether or not a default occurs herein.

17 11. Any failure on the part of Plaintiffs to take any action against Defendants as
18 provided herein in the event of any breach of the provisions of this Stipulation shall not be deemed
19 a waiver of any subsequent breach by Defendants of any provisions herein.

20 12. The parties agree that any payments made pursuant to the terms of this Judgment
21 shall be deemed to have been made in the ordinary course of business as provided under 11 U.S.C.
22 Section 547(c)(2) and shall not be claimed by Defendants as a preference under 11 U.S.C. Section
23 547 or otherwise.

24 13. Should any provision of this Stipulation be declared or determined by any court of
25 competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity, and
26 enforceability of the remaining parts, terms or provisions shall not be affected thereby and said
27 illegal, unenforceable or invalid part, term, or provision shall be deemed not to be part of this
28 Stipulation.

1 14. This Stipulation is limited to the agreement between the parties with respect to the
2 unpaid and delinquent contributions and related sums enumerated herein, owed by Defendants to
3 Plaintiffs. This Stipulation does not in any manner relate to withdrawal liability claims, if any.
4 Defendants acknowledge that Plaintiffs expressly reserve their right to pursue withdrawal liability
5 claims, if any, against Defendants and all of their control group members, as provided by
6 Plaintiffs' Plan Documents, Trust Agreements incorporated into their Bargaining Agreements, and
7 applicable laws and regulations.

8 15. This Stipulation contains all of the terms agreed by the parties and no other
9 agreements have been made. Any changes to this Stipulation shall be effective only if made in
10 writing and signed by all parties hereto.

11 16. This Stipulation may be executed in any number of counterparts and by facsimile,
12 each of which shall be deemed an original and all of which shall constitute the same instrument.

13 17. Defendants represent and warrant that they have had the opportunity to be or have
14 been represented by counsel of their own choosing in connection with entering this Stipulation
15 under the terms and conditions set forth herein, that they have read this Stipulation with care and
16 are fully aware of and represent that they enter into this Stipulation voluntarily and without duress.

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1 18. The parties agree that the Court shall retain jurisdiction of this matter until this
2 Judgment is satisfied.

3 Dated: April 9, 2014

AUGUST CONSTRUCTION &
SHORING, INC.

4
5 By: 

6 Agust Agustsson
RMO/CEO/President of Defendant

7 Dated: April 9, 2014

AGUST AGUSTSSON

8 By: 

9 Agust Agustsson, Individually

10 Dated: April __, 2014

OPERATING ENGINEERS LOCAL
NO. 3 TRUST FUNDS

11 By: _____

12 David E. Hayner
13 Collections Manager

14
15 IT IS SO ORDERED.

16 IT IS FURTHER ORDERED that the calendar in this matter is vacated, and that the Court shall
17 retain jurisdiction over this matter.

18
19 Dated: _____, 2014

20 UNITED STATES DISTRICT COURT JUDGE

1 18. The parties agree that the Court shall retain jurisdiction of this matter until this
2 Judgment is satisfied.

3 Dated: April 2014

**AUGUST CONSTRUCTION &
SHORING, INC.**

5 By: _____

Agust Agustsson
RMO/CEO/President of Defendant

7 Dated: April 2014

AGUST AGUSTSSON

9 By: _____

Agust Agustsson, Individually

10 Dated: April 2014

**OPERATING ENGINEERS LOCAL
NO. 3 TRUST FUNDS**

12 By: _____

David E. Hayner
Collections Manager

15 IT IS SO ORDERED.

16 IT IS FURTHER ORDERED that the calendar in this matter is vacated, and that the Court shall
17 retain jurisdiction over this matter.

19 Dated: _____ 2014

UNITED STATES DISTRICT COURT JUDGE

**AUGUST CONSTRUCTION &
SHORING, INC.**

By: Agust Agustsson
RMO/CEO/President of Defendant

AGUST AGUSTSSON

By: Agust Agustsson, Individually

OPERATING ENGINEERS LOCAL NO. 3 TRUST FUNDS

By: _____
David E. Hayner
Collections Manager

IT IS FURTHER ORDERED that the calendar in this matter is vacated, and that the Court shall retain jurisdiction over this matter.

Mafine M. Cheney
UNITED STATES DISTRICT COURT JUDGE